**Lecture**

**The Overall Framework**

Have any of you been careless lately? Has anyone slapped a person on the back in a good-natured gesture? How about accidentally spilling a toxic substance, like BBQ starter fluid, in a campground? Any one of these acts could be a Tort.
Unlike a Crime, which is a Public Wrong, a Tort is a Civil Wrong. It involves one person harming another person.
In order for there to be a legal remedy, that is in order for the injured person ( the Plaintiff) to be successful in Court, the Plaintiff must use one of three legal categories. (I note that the Text mentions four categories but I would like you to disregard “ Recklessness” as a separate category for now.)

**The Three Kinds of Tort**

The Law recognizes three different types of Tort: (1) Intentional Tort; (2) Negligence; and, (3) Strict Liability. Each has different elements which means that the Plaintiff (P) must prove something different depending on the type of Tort he or she is alleging that the Defendant (D) committed. Let’ s look at these one by one.
(Note: This Law is found in Cases, so I will be referring to Cases.)

**Intentional Tort** (p. 181 - 224)
P must prove that D intended to cause P harm. D must have desired to commit the act that caused P harm and there must be substantial certainty that the harm will result from D’s action.

*(a) Personal Rights*

This involves a Person’s physical and emotional zones.
Examples of this type of Intentional Tort include: Battery, Assault, False Imprisonment, Infliction of Emotional Distress, Defamation, Invasion of Privacy, Misuse of Legal Proceedings, and Fraud. Let’s look at these selectively:

The Howard v. Wilson case (textbook 186 - 187) gives an example of the Court using a common sense approach to decide a statute of limitations issue regarding the intentional tort of battery.

Durham v. McDonald's (textbook 189 - 190) gives an example of the requirements for a claim of intentional infliction of emotional distress.

The Intentional Tort of Invasion of Privacy could involve any one of four different torts. See textbook 208 - 210.

*(b) Property Rights*

Examples of this type of Intentional Tort include: Trespass to Land, Private Nuisance, and Conversion.

Stephens v. Pillen (textbook 216 - 217) discusses the tort of nuisance.

Conversion is the intentional exercise of control over another’s property without consent. See textbook 218.

You can also access these cases on LEXIS under the Library tab at the top of your page, if you wish

**Negligence** (p. 227)

In short, this area of the law is all about being able to legally blame and legally hold liable the person you say (allege) caused you harm.

As noted in the Text, many torts involve “personal injury" or “PI”.  Personal Injury is a lucrative area of law where attorneys get a percentage (%) of the money judgment awarded to Plaintiffs, if any.  These "contingent fees" are typically 33.33%, but can run as high as 40% of the total award.

The Tobacco settlement cases (recently in the news) stirred up controversy because attorneys for the Plaintiffs (state governments in this case) earned hundreds of millions of dollars in contingent fees.  As in other PI cases, if the Plaintiff does not recover then neither does the attorney.

**The Elements of a Negligence case.**
If any one of the following elements is not proven by the Plaintiff (P), then there is no Negligence on the part of the Defendant (D):

1. Duty of Care
2. Breach of Duty
3. Actual and Proximate Cause of Injury

Each of these must be proven for D to be held liable (legally to blame) for P’s injuries.
This means that P must prove that D owed P a “duty” to be careful toward P, and that D’s lack of care fell below a certain standard of behavior which resulted in P’s being injured by D’s act(s).
The legal standard of care is that of “the reasonable person”. The jury will determine if D acted as a reasonable person should have in the circumstances. (Note: There is no such person in real life; no one is reasonable and careful all the time.  It is a legal “fiction” that has come to be accepted by the Courts as the standard.)
Cases are very important in this area of the law. PI lawyers and their staff must keep up with the latest case decisions in order to predict what the Courts are likely to decide in their client’s situation. Therefore, let’s briefly review some of the Case Law...

*Breach of Duty*
In Duncan v. Union Pacific, (in the Unit) the Court threw out the plaintiff’s (P) case (remember Lecture 3 , Civil Procedure) in deciding that the Railroad met its standard of care and owed no further duty to P.
In the Culli v. Marathon (in the Unit) , the Court decided that the gas station owner did not meet the standard of care owed to P. In both the Duncan case and the Culli case note the Court’s reasoning; that is, be able to analyze how the Court reached its decision. The “how” part allows you to predict what the Court will do in a similar (future) situation.

*Injury*
P must prove that he or she has suffered damage of the type the Courts will recognize. In the Durham v McDonald's case (mentioned above), the Court decided that P may have suffered emotional distress from the legal point of view.

*Causation*
If D has fallen below the standard of care required of a reasonable person in D’s circumstances, has D necessarily caused the damage that P has suffered? The Republic of France v United States case (in the Unit, and also profiled on the History Channel from time to time) illustrates the concept of causation by analyzing whether D could have foreseen the chain of events that lead to P’s injuries. The Court looked at the very beginning of the chain and decided that D could not have known that the substance that started the chain of events would cause the initial explosion.

**Defenses to a Negligence lawsuit**

As you have no doubt realized, D does not “ roll-over-and-play-dead” when faced with a Negligence lawsuit. Four types of defenses exist for D to choose from:
1. contributory negligence
2. assumption of risk
3. comparative negligence
4. comparative fault
All of these have to do with “blaming” D, in some manner, for causing the injury either in whole or in part. Note: it is possible that P will recover nothing at all if P is only 10% at fault and sues in a State that applies the principle of Contributory Negligence.

**Strict Liability** (p. 254)

In this area of Tort, it doesn’t matter if D did not intend the consequences of his actions and it does not matter if he was not negligent. As long as it can be proven that D committed the act, then D will be held liable.
This might seem unfair especially given the hoops P must jump through to prove Negligence, but this Tort is most often used when D is engaged in “abnormally dangerous activities” or the manufacture or sale of defective and unreasonably dangerous products. D usually tries to argue that the principles of Negligence should apply and not the principles of Strict Liability.

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**Web Links**

[Wishnatsky v. Huey](http://caselaw.findlaw.com/nd-supreme-court/1201840.html)

[Lake v. Wal-Mart Stores](http://www.lawlibrary.state.mn.us/archive/supct/9807/c797263.htm)

[McCray v. Carstensen](http://highered.mcgraw-hill.com/sites/dl/free/0072933992/336381/ch06_McCray_vs_Carstensen.html)

Duncan v. Union Pacific: <http://www.leagle.com/decision/20021269195FSupp2d1074_11169>

[The McDonald's Hot Coffee case](http://www.lectlaw.com/files/cur78.htm) - This case is relevant to this Unit's Discussion Forum.

[Legal Information Institute](http://www.law.cornell.edu/) - This website maintains a collection of Resources that will help you with our Course. It is (perhaps) the best, most comprehensive "open source" available